IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-01932

REBECCA LADNER — APPELLANT

VERSUS

MICHAEL HOLLEMAN — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
CAUSE NO. A2401-08-00185

APPELLANT'S BRIEF

(ORAL ARGUMENT REQUESTED)

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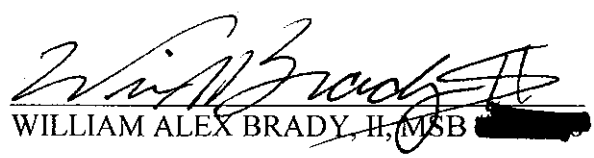
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Rebecca Ladner, Appellant
2. William Alex Brady, II, and Brady Law Firm, PLLC, Attorney for Appellant
3. Michael Holleman, Appellee
4. Edward J. Currie, Jr., and Currie Johnson Griffin Gaines & Myers, P.A., Attorney for Appellee
5. Jeremy T. Hutto, and Currie Johnson Griffin Gaines & Myers, P.A., Attorney for Appellee
6. Tim C. Holleman, and Boyce Holleman & Associates, Attorney for Appellee

Respectfully submitted, this the 15th day of July, 2011.

REBECCA LADNER, APPELLANT

BY: 

WILLIAM ALEX BRADY, II, MSB [redacted]

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STATEMENT OF THE ISSUES

The Appellant, Rebecca Ladner, presents the following issues for the Court's consideration:

1. Whether the Circuit Court erred in granting Holleman's Motion for Partial Summary Judgment, which dismissed with prejudice all claims arising out of Ladner's fall in Holleman's home, as well as all claims for damages arising therefrom.

2. Whether the trial court erred in finding that no genuine issue of material fact existed on the aforesaid issues.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings Below

Appellant Rebecca Ladner (hereinafter "Ladner") filed her Complaint in this matter in the Circuit Court of Harrison County, Mississippi, First Judicial District, on or about June 9, 2008, alleging negligence against the Defendant. (R. at 11-15) [1]; (R.E. at 1-5) [2]. Appellee Michael Holleman (hereinafter "Holleman") filed his Answer to Ladner's Complaint on October 23, 2008. (R. at 16-21); (R.E. at 6-11). This appeal stems from Holleman's Motion for Partial Summary Judgment and Memorandum Brief in Support of Motion for Partial Summary Judgment, filed on or about April 9, 2010. (R. at 22-80); (R.E. at 12-70). Ladner thereafter filed Plaintiff's Response, With Incorporated Memorandum of Authorities, in Opposition to Defendant's Motion for Partial Summary Judgment, on or about May 28, 2010. (R. at 81-125); (R.E. at 71-115). Holleman filed Defendant's Rebuttal in Support of Motion for Partial Summary Judgment on or about July 16, 2010. (R. at 126-231); (R.E. at 116-25) [3].

After a hearing before the Honorable Judge John C. Gargiulo on September 30, 2010, the Court issued a Rule 54(b) Final Judgment granting Holleman's motion, thereby dismissing specific claims from Ladner's lawsuit. (R. at 232); (R.E. at 126). Thus, Ladner appealed said Rule 54(b) Final Judgment to the Supreme Court of Mississippi, and timely filed her Notice of Appeal in the Circuit Court of Harrison County, Mississippi, First Judicial District, on or about November 19, 2010. (R. at 233-35); (R.E. at 127-29).

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[1] "R." is the abbreviation used by Appellant Ladner to cite to the page number of the Record prepared by the Circuit Court of Harrison County, Mississippi, First Judicial District.

[2] "R.E." is the abbreviation used by Appellant Ladner to cite to Appellant's Record Excerpts, which are submitted herewith pursuant to M.R.A.P. 30.

[3] Exhibits to Defendant's Rebuttal in Support of Motion for Partial Summary Judgment are not included in Appellant's Record Excerpts submitted herewith.

Statement of the Facts

On or about June 12, 2005, Ladner visited the home of Holleman for the purpose of riding bicycles along the boardwalk of Highway 90. (R. at 11-12, 81); (R.E. at 1-2, 71). Holleman owned the bicycle he provided to Ladner for the bicycle ride. *Id.* At said time and place, Ladner was unaware that the bicycle provided by Holleman had a steering malfunction, which caused her to fall to the side of the bicycle during the ride. (R. at 12, 81-82); (R.E. at 2, 71-72). As a result of the fall from the bicycle provided by Holleman, Ladner experienced minor abrasions to her left shoulder, left elbow, and knee; however, the abrasions Ladner received were not severe and did not prevent her from completing the remaining 11 and a half miles of the approximate 12-mile bicycle ride. (R. at 12, 82, 513); (R.E. at 2, 72, 138). In fact, in Ladner's deposition, when asked how she felt after she fell from Holleman's bicycle during the bicycle ride, she testified that she felt fine and that the bleeding had stopped. (R. at 513); (R.E. at 138).

Upon returning to Holleman's residence, Ladner went inside Holleman's home to the kitchen to get her Diet Coke and prepare to go home. (R. at 514); (R.E. at 139). While standing in Holleman's kitchen, Holleman entered the kitchen and began rendering aid by unilaterally and unexpectedly applying Neosporin with a pain ingredient to Ladner's elbow while she was drinking her Diet Coke. (R. at 12, 82, 515); (R.E. at 2, 72, 140). Ladner was startled by Holleman's sudden and unauthorized undertaking of applying an unknown salve to her wound, therefore, she asked Holleman what he was doing and he responded that he was putting Neosporin on her cut. (R. at 515); (R.E. at 140). As Ladner put down her Diet Coke, Holleman continued to attempt to apply Neosporin to Ladner's knee. (R. at 516); (R.E. at 141). Immediately following Holleman's application of the Neosporin, Ladner suffered a severe allergic reaction to the pain ingredient contained in the ointment, felt tingling and swelling in her lips (R. at 82, 517); (R.E. at 72, 142) and began to feel her throat closing, in that she could not swallow (R. at 519-20); (R.E. at 144-45).

Further, Ladner's breathing became labored and shallow. (R. at 520); (R.E. at 145). At that point, Ladner told Holleman that she could not breathe and Holleman suggested that she lie down on the couch. (R. at 521); (R.E. at 146). Ladner requested an ambulance and stated that she needed to go to the hospital, but Holleman refused Ladner's request and instead insisted that she lie down on the couch. (R. at 521-22); (R.E. at 146-47). In a state of anaphylactic shock, Ladner instead lay down on the floor, unable to move and struggling to breathe, and Holleman left to go to the store. (R. at 522-23); (R.E. at 147-48). Upon returning from the store, Holleman raised Ladner's head from the floor, placed a Benadryl pill in her mouth and gave her water. (R. at 526, 528); (R.E. at 150, 151). After lying on the floor for approximately two hours, Ladner attempted to stand when Holleman called for her from the bathroom; however, due to the profound allergic reaction she experienced, she was unable to stand on her own, which caused her to fall. (R. at 12, 82); (R.E. at 2, 72). When Ladner fell, she struck her head on the floor, which was raw concrete, and lost consciousness. (R. at 12, 82, 534, 537); (R.E. at 2, 72, 154, 157). In fact, Holleman acknowledged and testified under oath that Ladner fell inside his home in his deposition:

> Q. Okay. I think your testimony was you went into the bathroom; you're warming up the water; you called to her to come to the bathroom.
>
> A. Well, I said, Rebecca, can you come in here? And then within a few seconds, I heard something, and I went to the door of my bedroom to look out, and she was laying on the floor - - on her back.
>
> [omitted lines]
>
> A. No. I heard something, and at the time I thought it was something that hit the outside wall of the bathroom. The wall in that - - the other side of my bathroom wall would be the living room that she was in, but I don't know that's what it was. I heard something.
>
> [omitted lines]
>
> Q. Okay. What did you do after you realized she had fallen?

A. I helped her up and helped her to the bed in my bedroom, and I felt her head. She told me that she got up and fell.

[omitted lines]

Q. Okay. You may have touched on this . . . [w]hen you went to her as she lay on her back, did she tell you or was there a discussion of what had just happened?

[omitted lines]

A. Yeah, I asked her. I said, what happened? She said, I got up, and I fell . . . and it was apparent that that's what happened because she was three or four feet from where she had been laying when I last saw her where she had been sitting.

(R. at 289-91); (R.E. at 133-35).

Upon regaining consciousness after Ladner fell and struck her head, she struggled to focus her eyes and saw Holleman standing above her, whereupon Ladner again asked Holleman for an ambulance, to no avail. (R. at 537); (R.E. at 157). Holleman refused Ladner's request and instead led her to his bed. (R. at 541); (R.E. at 159). While lying in Holleman's bed, Ladner again asked for an ambulance for the third time, but Holleman refused. (R. at 545); (R.E. at 162). Ladner was ultimately able to gather strength to leave Holleman's residence; however, notwithstanding significant medical treatment as a result of the fall inside Holleman's home, Ladner has suffered permanent loss of her senses of smell and taste. (R. at 12, 82, 573); (R.E. at 2, 72, 163).

SUMMARY OF THE ARGUMENT

Holleman voluntarily rendered aid to Ladner and failed to exercise reasonable care, leaving her in a worse position than when he took charge of her. The law and deposition testimony *infra* confirm that Holleman voluntarily took it upon himself to care for Ladner's injuries; however, he failed to use reasonable care, which caused Ladner's condition to worsen. A reasonable person under the same or similar circumstances would have called an ambulance, as repeatedly requested by Ladner. Once Holleman began rendering aid to Ladner, he had a duty to act with reasonable care. Holleman breached this duty. Furthermore, Ladner's injuries were foreseeable. Ladner's fall resulting in a head injury was a reasonably foreseeable consequence of Holleman's failure to act with reasonable care in providing assistance after her severe allergic reaction and resulting fall.

The Circuit Court erred in granting Holleman's Motion for Partial Summary Judgment, which dismissed with prejudice all claims arising out of Ladner's fall in Holleman's home, as well as all claims for damages arising therefrom. Holleman's argument that Ladner was a licensee is irrelevant and immaterial. The lower court's application of the facts to the legal theory of premises liability, concluding that Ladner was a licensee, and wholly ignoring the Good Samaritan Statute, is flawed and erroneous.

ARGUMENT

I. Holleman voluntarily rendered aid to Rebecca Ladner and failed to exercise reasonable care, leaving her in a worse position than when he took charge of her.

In *Cowan v. Miss. Bureau of Narcotics*, 2 So.3d 759 (Miss.Ct.App. 2009), the Mississippi Court of Appeals stated the following regarding standard of review: "This Court employs a de novo standard of review of a lower court's grant or denial of a summary judgment and examines all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc." *Id.* at 763 (*quoting McMillan v. Rodriguez*, 823 So.2d 1173, 1176-77 (Miss. 2002)). The Mississippi Supreme Court has also held that it "reviews orders granting summary judgment *de novo*, without deference to the trial court." *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 649 So.2d 179, 181 (Miss. 1994) (*citing W.B. Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So.2d 1186 (Miss. 1994); *Davis v. Davis*, 558 So.2d 814 (Miss. 1990); *Huff v. Hobgood*, 549 So.2d 951 (Miss. 1989); *Short v. Columbus Rubber and Gasket Co.*, 535 So.2d 61 (Miss. 1988); *Pearl River County Bd. of Supervisors v. Southeast Collections Agency, Inc.*, 459 So.2d 783 (Miss. 1984)).

As stated herein above, the Court issued a Rule 54(b) Final Judgment granting Holleman's Motion for Partial Summary Judgment, thereby dismissing specific claims from Ladner's lawsuit. (R. at 232); (R.E. at 126). Ladner submits to the Court that said judgment is erroneous.

In support of his Motion for Partial Summary Judgment, Holleman relies, in part, on Miss. Code Ann. § 73-25-37, Mississippi's Good Samaritan Statute, which states the following:

> No duly licensed, practicing physician, physician assistant, dentist, registered nurse, licensed practical nurse, certified registered emergency medical technician, or any other person who, in good faith and **in the exercise of reasonable care**, renders emergency care to any injured person at the scene of an emergency, or in transporting the injured person to a point where medical assistance can be reasonably expected, shall be liable for any civil damages to the injured person as a result of any acts committed in good faith and in the exercise of reasonable care or omissions in good faith and in the exercise of reasonable care by such persons in rendering the emergency care to the injured person.

Miss. Code Ann. § 73-25-37 (emphasis added).

Mississippi law dictates that one who voluntarily assumes the care of an injured person is charged with the duty of common or ordinary humanity to provide proper care and attention. *Dyche v. Vicksburg, S. & P. R. Co.*, 79 Miss. 361, 30 So. 711, 712 (Miss. 1901). *See also New Orleans & N. E. R. Co. v. Humphreys*, 107 Miss. 396, 65 So. 497 (Miss. 1914). In *Dyche*, the Plaintiff brought a wrongful death suit on behalf of his father who was run over by several railroad cars owned by the Defendant. *Id.* at 711-12. Although the Mississippi Supreme Court held that the Defendant was not liable for the original injury of the decedent, it was error to give a peremptory instruction for the defendant, where "the jury should have been permitted to pass on the acts of the company...[a]ssuming the charge of Dyche as it did, it was charged with the duty of common humanity, and the jury should have been allowed to pass upon whether or not it performed this duty." *Id.*

In *Long v. Patterson*, the Mississippi Supreme Court cites to the Restatement of Torts to address the question of whether a duty exists to warn another of an approaching or impending danger, and states, "the actor's realization that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *Long v. Patterson*, 198 Miss. 554, 561, 22 So.2d 490, 492 (Miss. 1945) (*quoting* Restatement (Second) of Torts § 314 (1965)). However, the *Long* Court further stated, "[b]ut the rule is otherwise where the actor undertakes to render such service, although gratuitously, and the other person reasonably relies on the performance of the undertaking." *Id.* (*citing* Restatement (Second) of Torts § 325 (1965) (current version at Restatement (Second) of Torts § 323)).

The Court of Appeal of Louisiana has held that a legal obligation exists on the part of one undertaking to care for another. *David v. Southern Farm Bureau Casualty Ins.*, 122 So.2d 691, 693

(La. Ct. App. 1960). The *David* Court further relies upon 65 C.J.S. *Negligence* § 58, and states the following:

> One who undertakes to care for an ill or injured person is bound to use reasonable or ordinary care.
>
> . . . .
>
> Although the contrary view has been asserted, the more generally accepted rule is that on who voluntarily undertakes to care for, or to afford relief or assistance to an ill, injured, or helpless person is under a legal obligation to use reasonable care and prudence in what he does. In such case the measure of the duty assumed is to exercise ordinary or common humanity, or to exercise with reasonable care such competence and skill as he possesses, or to exercise such care in the treatment of the injured person as the circumstances will allow; and the person who undertakes the care is liable if the existing injuries are aggravated or other injuries are caused by lack of this measure of care.

Id. (*quoting* 65 C.J.S. *Negligence* § 58, p. 551).

Furthermore, the Restatement (Second) of Torts § 324, states the following, as set forth in *David*:

> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for bodily harm caused to him by aid, (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge; (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

Id. at 694. *See also Gates v. Chesapeake and O. Ry. Co.*, 185 Ky. 24, 213 S.W. 564 (1919); *Lacey v. United States* (D.C.Mass.) 98 F.Supp. 219; *Malloy v. Fong*, 37 Cal.2d 356, 232 P.2d 241; *McDonough v. Buckeye, S.S. Co.* (D.C.Ohio) 103 F.Supp. 473; *Murphy v. Wabash R. Co.*,.228 Mo. 56, 128 S.W. 481; Prosser, Torts (1941) p. 197; *Slater v. Illinois Central Railroad*, 209 F. 480 (1911); *Dunham v. Village of Canister* (303 N.Y. 498) 104 N.E.2d 872 (1952); 57A Am. Jur. 2d *Negligence* § 107.

The 5th Circuit Court of Appeals has also adopted the above stated law in holding that "the law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another

not to injure him by the negligent performance of that which he has undertaken." *United States v. Lawtaer*, 219 F.2d 559, 562 (5th Cir.1955). *See also* 38 Am. Jur. *Negligence* § 17. The duty to provide proper care and attention is fully performed by taking the injured person to a competent physician, hospital or infirmary. *David*, 122 So.2d at 693. *See also* 57A Am. Jur. 2d *Negligence* § 106; *Gates v. Chesapeake & O. Ry. Co.*, 185 Ky. 24, 213 S.W. 564 (1919).

Furthermore, deposition testimony of the parties reveals that Holleman voluntarily undertook the duty to render aid to Ladner and failed to exercise reasonable care, leaving Ladner in a worse position than when he took charge of her. During his deposition, Holleman admitted that he voluntarily rendered aid to Ladner in his application of Neosporin to her abrasions and "she started developing problems." (R. at 277); (R.E. at 130). Upon Ladner expressing concern to Holleman that she was having a reaction as a result of Holleman's application of Neosporin, Holleman admittedly provided assistance to Ladner and testified as follows:

> A. I got up and looked for some Benadryl twice during that period, once in my bedroom bathroom and once in the kitchen. I couldn't find any . . . .
>
> . . . I left and went to the drugstore, bought some Benadryl. I came back, got a glass of water, opened the package, gave her her Benadryl. She sat up, put the Benadryl in her mouth, and drank the water.
>
> And I said, well, we need to get this off of you, speaking of the Neosporin, if that's what's causing the problem. And I went to my bedroom bathroom, master bath and turned on the water to let it heat up. I was going to bring a wet but warm washcloth back.
>
> While that was heating up, I hollered out, Becky, can you come in here? I heard something. I don't know what it was, but it caused me to go out and look. And she was laying a few feet from where she had been laying . . . .

(R. at 281-82); (R.E. at 131-32).

Holleman admitted that after he heard something and went to look, Ladner told him that she got up and fell. (R. at 290-91); (R.E. at 134-35). Holleman further acknowledged that Ladner had

fallen, and stated "it was apparent that that's what happened because she was three or four feet from where she had been laying when I last saw her where she had been sitting." (R. at 291); (R.E. at 135).

Additionally, Holleman testified that he was aware that Ladner's sense of smell and/or taste had been affected "during the course of days that followed." (R. at 295); (R.E. at 136). Holleman further acknowledged responsibility for the accident and resulting injuries.

> Q. Tell me about whose idea - - or who initiated the claim with your homeowners insurance.
>
> A. I mean, I don't know whether she initiated it or I did. I know at some point I told her that if she would get a statement together and the bills, I would submit them. She did, and I submitted them.

(R. at 297); (R.E. at 137).

Ladner testified as to Holleman's failure to use reasonable care after undertaking the duty of rendering aid by applying Neosporin to her abrasions:

> Q. But you felt the tingling immediately when he - - Neosporin was put on. Is that what you're saying?
>
> A. Very - - very quickly.
>
> [omitted lines]
>
> Q. Okay. All right. And so you - - your lips are tingling. They're feeling swollen. What happens next?
>
> A. I stated I - - that there's something wrong. I was beginning to - - to feel a little numb and my lips were tingly. My - - I knew something was wrong, and I expressed to him: Something is wrong.
>
> Q. Okay. Did you feel the tingling anywhere other than your lips?
>
> A. I felt a little tingling in my fingertips.
>
> [omitted lines]
>
> Q. Okay. So it progressed from your lips to your fingertips, and then where did it progress to after that?

A. My throat.

Q. And what happened to your throat?

A. It began closing. My - - it was difficult - - I could not swallow at - -

Q. What did you try to swallow?

A. My own - - my own spit.

Q. Saliva?

A. Yes. I mean, just to make a swallowing action. I could not swallow.

Q. Oh, okay. Well, could you breathe?

A. It was becoming labored. My breathing was becoming very shallow.

[omitted lines]

Q. Well, what happened when you started having difficulty breathing?

A. At that point - - at the initial tingling stage, I said, Something is wrong. And by the time I could get from the kitchen, Mike Holleman said, Why don't you go lay on the couch. I said, I - - I think I need help. I - - I think I need help. I'm - - at that point my - - my throat was starting to close up and I couldn't breathe. And I said - -

Q. Did you tell Mike, I can't breathe?

A. Yes. I - - I - - he - - at that point he left.

Q. Wait a minute. Let me back up before he left. You told Mike, I cannot breathe?

A. Yes.

Q. And what did he say or do when you said, I cannot breathe?

A. He said, Lay down there and let's - - let's see what's wrong. Let's see what happens. I said, I think I need to go to the hospital. I think something's wrong. I think I need help. And it was very rapid that it went from the tingling to my throat closing up.

[omitted lines]

Q. And so you told Mike, I want to go to the hospital.

A. Yes. I said, I - - I need help. I said, I need help. Something - - something is wrong. I had no idea what was happening.

Q. And what did he do when you told him that?

A. He - - he left. He - - I laid on the floor and he left.

Q. Did he say anything before he left?

A. He said, I'll - - I'm going to the store. I'll be right back.

[omitted lines]

Q. All right. What happened when Mike got back?

A. He raised my - - raised my head. I did - - don't - - raised my head, and he put a pill in my mouth and gave me water, and I was able to swallow the pill.

[omitted lines]

Q. Okay. And then after you took the pill, what happened?

A. I continued to lay on the floor.

Q. Well, did you feel any differently after you took the pill?

A. Not - - after some time, the - - my throat began to relax.

[omitted lines]

Q. Did you ever ask Mike to call you an ambulance?

A. Yes.

Q. When?

A. On three - - the best of my recollection, three times.

Q. All right. Let's talk about that. When was the first time you asked him to call an ambulance?

A. When I began the swelling of my throat and laid on the floor, in that time period.

Q. Okay. When was the next time you asked him to call an ambulance?

A. The next time I asked was when I - - when I gained - - when I regained consciousness.

Q. After you fell?

A. Yes.

[omitted lines]

A. I stated that I was freezing. I was freezing. I needed help.

Q. Is that when you asked for an ambulance?

A. Yes. I asked for help again.

Q. Well, now, asking for help is different from asking - -

A. I asked him to please get help, to take me to a hospital.

Q. Did you - - did you actually ask him to call an ambulance?

A. Yes. Is that not 911?

Q. My question is did you ask him to call an ambulance.

A. Yes.

[omitted lines]

Q. And when you asked Mike that, what did he say?

A. He said, Come lay down on the bed.

[omitted lines]

Q. Okay. All right. So what did you do after your stint on the bed under the blanket? What happened after that?

A. I laid there. He - - I could hear. He walked in the room and asked if I was alive.

[omitted lines]

Q. I'm just wondering when he said - - when he asked you, Are you alive, did you say yes or - -

A. No. I didn't. I didn't respond.

Q. So when he asked you if you were alive, you were silent.

A. Yes.

Q. Okay. Did he ever walk over and check on you?

A. No.

Q. So when he asked you that question, he was just inside the door.

A. Correct.

Q. All right. When was the third time you asked him for an ambulance?

A. At the - - the second time that he - - that he walked in the room.

Q. How many times did he walk in the room?

A. I don't recall. Not more than twice.

Q. So the second and last time he walked in the room.

A. Yes, when I could speak.

Q. All right. And you asked him for - - did you ask him for an ambulance or did you ask him to call 911?

A. I asked him to call 911.

Q. And what did he say?

A. Nothing.
Q. So that's the third time you asked him.

A. Yes.

Q. Okay. And then what happened after you got up off the bed?

A. I continued to lay there until I felt I had enough consciousness to leave. I was afraid for my life.

Q. Okay. And why were you afraid for your life?

A. He refused to get help.

(R. at 517-23, 525-26, 530-31, 535-36, 540-41, 543-45); (R.E. at 142-50, 152-153, 155-56, 158-59,

160-62).

The foregoing law and deposition testimony confirm that Holleman voluntarily took it upon himself to care for Ladner's injuries; however, he failed to use reasonable care, which caused Ladner's condition to worsen. A reasonable person under the same or similar circumstances would have called an ambulance, as repeatedly requested by Ladner. Holleman attempts to take the focus off of his failure to act with reasonable care by stating that Ladner did not stop at "Gulfport Memorial Urgent Care Center on her way home...and she never even went to the emergency room." This argument is irrelevant and without merit. Once Holleman began rendering Ladner, he had a duty to act with reasonable care. Holleman breached this duty.

II. Rebecca Ladner's injuries were foreseeable.

Holleman attempted to assert that Ladner's "allergic reaction and fall were not foreseeable, and there is no proof as to what caused Ladner to fall." This assertion is flawed. Holleman relied, in part, on *City of Jackson v. Estate of Stewart* in support of this argument, and erroneously cites the Court to page 705 of that opinion to argue foreseeability. The *Stewart* Court was presented with facts involving an elderly woman, Mrs. Stewart, who fell and hit her head on the pavement and suffered a massive stroke. *City of Jackson v. Estate of Stewart*, 908 So.2d 703, 706-07 (Miss. 2005). The Court held that "a stroke is not an injury but rather a medical condition which is not an anticipated result of trauma." *Id.* at 715. Clearly, the facts surrounding *Stewart* are not analogous to the case at bar.

In *Spotlite Skating Rink, Inc. v. Barnes*, the Mississippi Supreme Court stated the following regarding foreseeability:

> Finally, Spotlite argues that it cannot be held liable for Bianca's death because such an injury was unforeseeable. "It is well established in this State, that in order for one to be liable in a negligence action the test is not whether they were able to foresee the particular type of injury suffered, but whether they could foresee an injury would result from their actions. Further, "[t]he fact that an injury rarely occurs, or has never

> happened, is insufficient to protect the actor from a finding of negligence.... If *some* injury is to be anticipated, this Court will find liability even if the *particular* injury could not be foreseen."

Spotlite Skating Rink, Inc. v. Barnes, 988 So.2d 364, 369 (Miss. 2008) (citations omitted) (emphasis in original). The *Barnes* Court further compared the factual discrepancies with *Stewart, supra*, and held: "Therefore, even in Bianca's death may not have been foreseeable, there was sufficient evidence that a fall resulting in a head injury was a reasonably foreseeable consequence of a lack of supervision." *Id.*

Furthermore, Holleman cites *Finkelburg v. Luckett*, 608 So.2d 1214 (Miss. 1992), to state that an alleged tortfeasor is not required to anticipate or prevision an extraordinary occurrence. However, Holleman again relies upon a case with dissimilar facts. The allegations in *Finkelburg* involve funds contained in a Merrill Lynch account being frozen pending resolution of a marital dispute. *Finkelburg*, 608 So.2d at 1216. The damages alleged by the Plaintiff were for mental anguish as a result of the aforesaid actions. *Id.* at 1221.

It is apparent that the controlling case in the instant matter is *Barnes*. Ladner's fall resulting in a head injury was a reasonably foreseeable consequence of Holleman's failure to act with reasonable care. It was reasonably foreseeable that Ladner would fall as a result of Holleman asking her to get up and walk to the bedroom bathroom without supervision or help, as he admitted to in his deposition by stating, "I hollered out, Becky, can you come in here?" (R. at 282); (R.E. at 132).

III. The Circuit Court erred in granting Holleman's Motion for Partial Summary Judgment based upon the theory of premises liability, which dismissed with prejudice all claims arising out of Ladner's fall in Holleman's home, as well as all claims for damages arising therefrom.

The lower court made its ruling from the bench subsequent to argument of counsel, and stated the following, in pertinent part, in support thereof:

> THE COURT: All right. Having reviewed the briefs, the case law that was cited to and supplied, as well as oral argument and all attachments to the motions and briefs, I find that the issue before the Court at this time is an issue of duty. The duty that's owed is the Court's understanding is the prime issue. And it's Court's opinion that that would be a matter of law, not an issue for a jury to determine. And as was brought out abundantly throughout the course of argument, it's either the issue - - or rather the standard under the Good Samaritan Statute, or the standard that's incumbent under the licensee provisions, that being willful or wanton, as opposed to the defendant acting in good faith and reasonably . . . . **It's the Court's opinion that this is a premises liability action.**

(Tr. at 31-32); (R.E. at 164-65) (emphasis added).

Holleman's argument that Ladner was a licensee is irrelevant and immaterial, and the lower court's reliance on the legal theory of premises liability was erroneous. Holleman provided a flawed analysis of a legal basis of his Motion for Partial Summary Judgment. In his supporting memorandum brief, Holleman first set forth the argument that "Ladner was a mere licensee when she was in Holleman's home." Any argument of premises liability, or that Ladner was a licensee, in support of Holleman's Motion for Partial Summary Judgment is simply missing the point, in that Ladner made no such claim of negligence based upon the legal theory of premises liability. Ladner acknowledges that she was a licensee while in Holleman's home. As such, any arguments of Holleman regarding same should be disregarded as immaterial to the case at bar.

The lower court's application of the facts to the legal theory of premises liability, concluding that Ladner was a licensee, and wholly ignoring the Good Samaritan Statute, is flawed and erroneous. If Ladner had fallen and struck her head in the street in front of Holleman's home, and Holleman began rendering aid in the same unreasonable manner, would the Good Samaritan Statute only then apply? Ladner submits that the intent of the legislature was to create a duty for someone who undertakes the task of rendering aid to an injured person. The question as to whether Holleman was reasonable in rendering aid to Ladner is one for the jury. Ladner respectfully submits that the lower court's reasoning was flawed and its decision must be reversed.

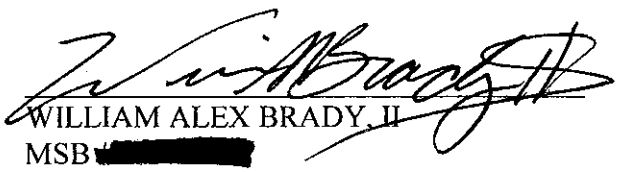
CONCLUSION

The Circuit Court erred in granting Holleman's Motion for Partial Summary Judgment based upon the theory of premises liability, which dismissed with prejudice all claims arising out of Ladner's fall in Holleman's home, as well as all claims for damages arising therefrom.

For the reasons stated herein, Appellant Rebecca Ladner respectfully requests this Court to reverse the decision of the Circuit Court.

Respectfully submitted, this the 15th day of July, 2011.

REBECCA LADNER, APPELLANT

BY: 

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CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. 31(c), I hereby certify that I have delivered, via United States first class mail, the original and three (3) true and correct copies of the above and foregoing Appellant's Brief to Kathy Gillis, Clerk, Supreme Court of Mississippi, Post Office Box 249, Jackson, Mississippi 39205-0249.

I further certify that I have this date delivered a true and correct copy of the above and foregoing Appellant's Brief to the following:

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I further certify that, pursuant to M.R.A.P. Rule 28(m), I have also mailed an electronic copy of the above and foregoing on an electronic disk and state that this brief was written on Microsoft Word format.

SO CERTIFIED, this the 15th day of July, 2011.

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